90-951

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1990

UPTON COUNTY, TEXAS, PETITIONER

VS.

MARY TURNER, a/k/a MARY TURNER HIND,
A Feme Sole

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO REVIEW A RULING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

We believe that the Petition for Writ of Certiorari has misstated the questions presented. The ruling in the Court of Appeals merely reverses a summary judgment granted in the Trial Court, and remands. The correct questions should be:

1. After proper Trial Court proof, can the municipality (Upton County) be held liable for the illegal or unconstitutional actions of its final policymakers themselves as they engage in the setting of goals and the determination of how those goals will be achieved?

2. Upon proper proof in the Trial Court, could the participation of an elected District Attorney in an extra-judicial conspiracy with the Sheriff also subject the municipality (County) to liability?

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VS.

MARY TURNER, a/k/a MARY TURNER HIND,

A Feme Sole, Plaintiff

BRIEF IN OPPOSITION TO A

PETITION FOR A WRIT OF CERTIORARI

TO REVIEW AN OPINION OF

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MARY TURNER, a/k/a MARY TURNER HIND, a feme sole, Plaintiff below, through her counsel, John E. Gunter, files this Brief in Opposition to the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case. All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

OPINIONS BELOW

Petitioner's brief contains additional misstatements.

1. The opinion of the Court of Appeals is shown, infra in Appendix B, pages B-1 through B-22. It was reported at 915 F.2d 133.

2. The Order Denying Rehearing of the said U.S. Court of Appeals is shown, infra, as Appendix C, pages C1 through C3.

3. The opinion of the United States District Court for the Western District of Texas dated October 9, 1989 was shown in Petitioner's Appendix A, pages A1-A23. True, such opinion was not reported, but as discussed below, the jurisdiction of the Court of Appeals was based upon the Rule 54(b) Judgment of the said District Court, not the said Order dated October 9, 1989.

4. The Rule 54(b) Judgment of the U.S. District Court for the Western District of Texas, Midland-Odessa Division, is shown, infra, as Appendix A, page A1 through A2.

JURISDICTION

Petitioner for Writ of Certiorari is correct when he states that jurisdiction is invoked under 28 U.S. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1983 of Title 42 United States Code.

2. Fed. R. Civ. P. 54(b).

STATEMENT

In order to refrain from a nit-picking exercise in rhetoric to point out perceived misstatements of fact in Petitioner's "Statement", Respondent would herewith recite a correct Statement.

CORRECT STATEMENT

MARY TURNER brought suit against UPTON COUNTY, TEXAS and the Sheriff of UPTON COUNTY, individually and as Sheriff, as well as against other individual persons playing various roles in the operative facts.

TURNER alleged that the Sheriff had conspired to subject her to a "sham" trial for possession of methamphetamine and offered to prove that (1) the Sheriff himself was the one who had arranged for the methamphetamine to be planted on TURNER's business establishment and who (2) also conspired with others to obtain perjured testimony at her trial in an attempt to obtain her conviction on such charges in State Court.

The District Court granted a summary judgment for Defendant UPTON COUNTY. The District Court certified its judgment pursuant to Fed. R. Civ. P. 54(b) and TURNER appealed.

On appeal, the Court of Appeals reversed the Trial Court's granting of a summary judgment for UPTON COUNTY and remanded for trial.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The issue presented is the very narrow question of whether the Trial Court should have granted a summary judgment allowing a municipality (hereinafter sometimes called "UPTON COUNTY") to escape liability for the acts of its final policymaker, its elected sheriff, in the area of law enforcement when such acts were solely involved in the setting of goals of

law enforcement and the determination of how those goals will be achieved. Could the fact that the acts (or methods used) by such an official policymaker were criminal insulate the municipality or in some way justify such acts?

The very well reasoned opinion of the Court of Appeals is appended hereto infra in its entirety as Appendix B, page B1 through B22. Also the EnBanc rehearing denial is appended here, infra, as Appendix C, page C1 through C3.

Judge Politz's opinion quite correctly points out that the distinction to be carefully followed in a case of this nature is that the County

> "may be held liable for the illegal or unconstitutional actions of its final policymakers themselves as they engage in the setting of goals and the determination of how those goals will be achieved."

See Politz opinion at Page B12.

Neither Monell vs. New York City Department of Social Services, 436 U.S. 658, nor Pembaur vs. City of Cincinnati, 475 U.S. 469 are in conflict with each other as respects their holdings concerning liability of the county for the acts of its policymakers in furtherance of the goals of such policies. The condemnation of a respondeat superior theory of vicarious liability is not condoned or enlarged in these cases because both announce and recognize that vicarious liability attaches in the very narrow concept where the municipality clothes its final policymaker with unbridled discretion to accomplish the goal of the policy.

Petitioner claims (on Page 9 of his Reasons for Granting the Petition) that Judge Politz has held "that any illegal act committed by a final policymaker will be sufficient to impose municipal liability", and cites Page B17 of the Politz opinion. This claim of Petitioner is a misstatement. What the opinion really says is:

> "The County contends that it cannot be subject to liability because it did not authorize the sheriff to violate the law. This argument is without merit. Where a final policymaker abuses the powers vested in his position to the detriment of a citizen, that abuse can be the basis for the suit being brought under Section 1983, assuming the other bases for satisfying the requirements of that section are properly alleged."
>
> Footnote 3, Politz Opinion, Page B17

It is unquestioned that a County Sheriff, in Texas, is the county's final policymaker in the area of law enforcement.

The type of vicarious liability upon the municipality discussed, defined and distinguished in Monell and Pembaur would never embrace vicarious liability, for an act of a sheriff for a criminal (or even bad manners) act committed wholly separate and apart from his attempts to accomplish a policymaking goal. A sheriff could kill his wife, cheat his business partner - the list would be virtually unending - without subjecting the county to liability. But the victims of "dead aim", intentional acts, including crimes, by a county's final policymaker in the setting and achievement of the goals of that (law enforcement) policy deserve the protection afforded by the very rationale of 42 U.S.C. 1983.

2. The liability of the County is not doubled or even increased by the imposition of liability for the acts of one who is in conspiracy with the Sheriff. The conspiracy constitutes in law one act. The extra-judicial acts of an elected District Attorney in conspiring with a Sheriff to commit a crime constitutes one act which would trigger liability. Imbler vs. Pachtman, 424 U.S. 409, 47 L.ED.2d 128, 96 S.Ct. 994 (1976) announces the broad immunity of a District Attorney for in-court actions, but it very wisely points out that a District Attorney could be a party to an extra-judicial (i.e., out of court) conspiracy. Imbler (at page 994)

Obviously, at trial, Respondent would first, and perhaps only, shoulder the burden of proving the acts of the Sheriff in order to obtain vicarious liability on the County,

but if in the course of that proof a conspiracy between the Sheriff and extra-judicial acts of the District Attorney are developed Respondent should not be blocked in her proof of the conspiracy to violate her civil rights.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The remand to the Trial Court would be preserved and the matter allowed to proceed orderly for proof in the Trial Court.

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APPENDIX A

ORDER OF U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, MIDLAND-ODESSA DIVISION

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MARY TURNER	)	
	)	
V.	)	MO-88-CA-311
	)	
UPTON COUNTY, TEXAS, et al	)	

RULE 54(b) JUDGMENT

BEFORE THIS COURT came to considered the Motion for Summary Judgment of one of the Defendants to the above-numbered cause, Upton County, Texas. By Order dated October 9, 1989, and for reasons stated therein, this Court granted Upton County's Motion in its entirety, thereby dismissing the County from the suit. Plaintiff has expressed her intent to appeal the Court's ruling with regard to Upton County and, should the Fifth Circuit affirm this Court's ruling, dismiss the remaining Defendants and the suit.

In light of the above, this Court finds that there is no just reason for delay of the appeal and finds that Judgment as to Upton County should be entered. Accordingly,

IT IS ORDERED, ADJUDGED and DECREED that the Plaintiff take nothing by her suit against Upton County, Texas. Upton County is hereby DISMISSED WITH PREJUDICE from the suit at bar pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

SIGNED AND ENTERED this 15th day of November, 1989.

/S/
LUCIUS D. BUNTON
CHIEF JUDGE

APPENDIX B

OPINION OF THE U.S. COURT
OF APPEALS, FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-8034

MARY TURNER, a/k/a MARY
TURNER HIND, A Feme Sole,

Plaintiff-Appellant

versus

UPTON COUNTY, TEXAS,

Defendant-Appellee

APPEAL FROM THE U.S. DISTRICT COURT OF
THE WESTERN DISTRICT OF TEXAS
(MO-88-CA-311)

(September 11, 1990)

Before RUBIN, POLITZ, and BARKSDALE, Circuit Judges.

POLITZ, Circuit Judge:*

Contending that Upton County, Texas should be held liable under 42 U.S.C. §1983 for the alleged conspiracy of the county sheriff and district attorney to subject her to a "sham" trial, Mary Turner appeals the district court's grant of summary judgment in favor of the county. Concluding that the alleged actions, if

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

proven, properly would be regarded as actions of the county, we reverse and remand for further proceedings consistent herewith.

Background

Turner's lawsuit is based upon events surrounding her March 1987 trial in Texas state court on felony drug charges. Turner alleges that in August 1985 then-Upton County Sheriff Glenn Willeford paid Larry Woolf, an informant, to plant methamphetamine on her business premises and then, acting under color of law, the Sheriff seized the drugs pursuant to a search warrant, leading to her indictment for possession of a controlled substance.[1]

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[1] Turner Alleges that Sheriff Willeford's actions were motivated by revenge or a desire to "keep her quite" because she was aware of improprieties allegedly committed by him.

Turner further alleges that Sheriff Willeford then conspired with J.W. Johnson, Jr., District Attorney for the 112th Judicial District, which includes Upton County, to force her to stand trial on what they knew to be a trumped-up charge, to secure perjured testimony by one Larry Dale Jackson in an attempt to discredit one of her witnesses, and to convince her to plead guilty to an offense of which they knew she was innocent.

On December 8, 1988 Turner filed suit against the county, Woolf, and the sheriff, both in his official and individual capacities. On March 16, 1989 Turner added District Attorney Johnson as a defendant in both his official and individual capacities.

In July 1989 the district court ruled that the Texas two-year statute of limitations applied to Turner's allegations, citing **Owens v. Okure**, 488 U.S. 235 (1989). Under this earlier ruling, which is now the law of the case, both the county and the sheriff may be held liable for their actions from December 8, 1986 to the present, and both the county and the district attorney may be held liable for their actions from March 16, 1987 to the present. The events surrounding the alleged "planting" of the methamphetamine, Turner's arrest, and her indictment, are no longer available as a cause of action.

Following the district attorney's successful motion for a more definite

statement, Turner filed a third amended complaint. The district court granted summary judgment absolving the county of all liability and Johnson of liability in his official capacity. With regard to the county, the district court found that Turner had failed to plead specific facts sufficient to show that her alleged injuries had been caused by an official county policy or custom. The court concluded that to subject the county to liability for the acts of the sheriff and district attorney would amount to respondeat superior, an outcome precluded by **Monell v. New York City Department of Social Services**, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The court further held that the district attorney

was entitled to absolute immunity from section 1983 liability for actions taken within the scope of his prosecutorial role, **Imbler v. Pachtman**, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), but that Turner's allegations of a conspiracy between him and the sheriff stated a claim upon which Turner could recover against the district attorney in his individual capacity. Despite the continued viability in whole or in part of her claims against the individual defendants, Turner expressed her desire to appeal the dismissal of Upton County, stipulating that she would dismiss the remaining claims if the district court's ruling were affirmed. The court certified its judgment pursuant to Fed.R.Civ.P. 54(b) and Turner timely appealed.

Analysis

Remaining in the wake of the district court's prior limitation ruling and its current ruling on appeal is Turner's claim that the sheriff, in his official and individual capacities, and the district attorney, in his individual capacity, conspired to subject her to trial on false charges bolstered by fabricated evidence and perjured testimony and, despite their knowledge of the true circumstances and of her innocence, attempted to coerce her to change her plea from not guilty to guilty. The county's liability, if any, must be based upon this claim.

In granting summary judgment for the county the district court apparently assumed that the sheriff's authority was

granted by the county's governing body, which the court concluded had given him "discretionary authority in certain circumstances." The court's analysis of county liability was premised upon the following language from the Supreme Court's opinion in **City of St. Louis v. Praprotnik**:

> [T]he authority to make municipal policy is necessarily the authority to make final policy. . . . When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their

> ratification would be chargeable to the municipality because their decision is final.

485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (citations omitted, emphasis in original). In premising the county's liability on whether its governing body had ratified the alleged actions of these officials, i.e., whether they had acted pursuant to an official county policy or custom, the district court inadvertently overlooked the possibility that the sheriff and district attorney were themselves the final policymakers with respect to the matters under their jurisdiction whose actions, to the citizens of Upton County, were the actions of the county itself.

Two configurations can lead to a municipality's liability under section

1983 for the acts of its officials. In the first, typified by the district court's reference to **Praprotnik**, a municipality's final policymakers are held effectively to have made policy or condoned creation of a custom by ratifying the unconstitutional or illegal actions of subordinate officers or employees. In the second, the municipality may be held liable for the illegal or unconstitutional actions of its final policymakers themselves as they engage in the setting of goals and the determination of how those goals will be achieved. See **Pembaur v. City of Cincinnati**, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). We find the latter, not the former, to be applicable in the instant case.

It has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected:

> Because of the unique structure of county government in Texas . . . elected county officials, such as the sheriff . . . . hold[] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. . . . Thus, at least in those areas in which he, along, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

Familias Unidas v. Briscoe, 619 F.2d 391,

404 (5th Cir. 1980) (quoting Monell, 436 U.S. at 694, citations omitted); see **Bennett v. City of Slidell**, 728 F.2d 762, 796 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). Among other responsibilities he is charged with preserving the peace in his jurisdiction and arresting all offenders. Tex. Code Crim. P. arts. 2.13, 2.17. As the county's final policymaker in this area, he has been empowered by the state to "define objectives and choose the means of achieving them" without county supervision. **Rhode v. Denson**, 776 F.2d 107, 109 (5th Cir. 1985), cert. denied, 476 U.S. 1170 (1986). These means include the investigation of crimes, the

collection of evidence thereof, and the presentation of this evidence to the district attorney for purposes of determining the appropriateness of prosecution. In essence, Turner alleges that in her case the sheriff, in conspiracy with the district attorney, set an impermissible goal of subjecting her to trial on false charges and used the powers inherent in his position as chief county law enforcement officer to create the case presented at trial, secure perjured testimony, and attempt to coerce her to plead guilty.

If proven, therefore, the sheriff's participation as a coconspirator, constituting as it would an abuse of his

authority as the ultimate repository of law enforcement power in Upton County, would render the county liable as well.[2]

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[2] Cognizant of potential eleventh amendment complications, we have repeatedly confronted the issue of whether a county official in particular circumstance was acting as an official of the state or of the county. See **Familias Unidas**, 619 F.2d at 404 (county judge implementing unconstitutional state law acted as a state official); **Crane v. Texas**, 759 F.2d 412 (5th Cir.), amended on reh'g, 766 F.2d 193 (5th Cir.), cert denied, 474 U.S. 1020, 106 S.Ct. 570, 88 L.Ed.2d 555 (1985) (district attorney enforcing unconstitutional county policy acted as a county official); **Echols v. Parker**, Nos. 89-4349, 89-4633 (5th Cir. August 13, 1990) (when official, state or local, is directed in his actions by state statute, he acts as a state official).

Turner's allegations are somewhat different in that her complaint does not concern the way in which the sheriff enforced a state or county law or policy enforced by another branch of one of those entities; rather, she alleges that he abused the powers inherent in his role as chief policymaker for how the peace should be kept in Upton County.

Holding the county liable for the actions of its sheriff under these circumstances does not run afoul of **Monell's** admonition against respondeat superior liability on the part of the county for the actions of its employees. The sheriff is an elected county official equal in authority to the county commissioners within that jurisdiction; his actions are as much the actions of the county as the actions of those commissioners.[3] As the Supreme Court stated in **Pembaur**:

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[3] The county contends that it cannot be subject to liability because it did not authorize the sheriff to violate the law. This argument is without merit. Where a final policymaker abuses the powers vested in his position to the detriment of a citizen, that abuse can be the basis for suit being brought under section 1983, assuming the other bases for satisfying the requirements of that section are properly alleged.

To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the City Councils in **Owen**[4] and **Newport**.[5] In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers.

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[4] **Owen v. City of Independence**, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (city council passed resolution firing plaintiff without a pretermination hearing).

[5] **Newport v. Fact Concerts, Inc.**, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (city council canceled concert license after dispute over content of performance).

Pembaur, 475 U.S. at 483.

Just as the alleged actions of the sheriff were, under the circumstances, the actions of the county for section 1983 purposes, so too the alleged actions of the elected district attorney may have been, even though he covered more than his county. The sheriff's and the district attorney's alleged participation in the conspiracy, if proven, will suffice to impose liability on the county.

> The contention that a conspiracy existed which deprived the petitioner of rights guaranteed by federal law makes each member of the conspiracy potentially liable for the effects of that deprivation. Liability arises from membership in the conspiracy and from traditional notions that a conspirator is vicariously liable for the acts of his co-conspirators. Liability does not arise solely because of the individual's own conduct. Some personal conduct may serve as

absolving the county of section 1983 liability.[7]

The judgment of the district court is REVERSED and the matter is REMANDED for further proceedings consistent herewith.

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[7] Turner also complains that the district court erred in concluding that she had failed in her third amended complaint to allege viable state claims against the parties over which it could assert its pendent jurisdiction and urges that the court should have exercised its power to hear her state claims. Turner's state law allegations against the county are based solely upon "respondeat superior," which is not, in and of itself, a cause of action. Moreover, Turner does not assert that the district court abused its discretion in refusing to exercise pendent jurisdiction, only that it should have done so. We will not disturb the court's ruling. See **Evans v. City of Dallas**, 861 F.2d 846 (5th Cir. 1988).

APPENDIX C

ORDER OF THE U.S. COURT OF APPEALS, FIFTH CIRCUIT DENYING MOTION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-8034

MARY TURNER, a/k/a
MARY TURNER HIND, A Feme Sole,

Plaintiff-Appellant,

versus

UPTON COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the
United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 9-11-90, 5 Cir., 198__, _____
_____F.2d_____)

(OCTOBER 11, 1990)

Before Rubin, Politz, and Barksdale, Circuit Judges.

PER CURIAM:

(v) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
Henry A. Politz
United States Circuit Judge

> evidence of membership in the conspiracy, but the individual's actions do not always serve as the exclusive basis for liability.[6]

Slavin v. Curry, 574 F.2d 1256, 1263 (5th Cir. 1978), overruled on other grounds, **Sparks v. Duval County Ranch Co.**, 604 F.2d 976 (5th Cir.) (en banc), aff'd, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1979). In stating that the county could be held liable not only for the sheriff's participation in the conspiracy, but could be held directly or vicariously liable as well for the actions of his alleged

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[6] As a consequence, all parties to an alleged section 1983 conspiracy need not be state actors or charged in the same capacities for liability to attach to all -- even if one of the coconspirators is absolutely immune from liability for his own actions as a participant. See **Richardson v. Fleming**, 651 F.2d 366 (5th Cir.) 1981).

coconspirator, we carefully distinguish this premise for vicarious liability from that prohibited by **Monell**, in which "the sole nexus between the employer and the tort is the fact of the employer-employee relationship." **Monell**, 436 U.S. at 693.

When the official representing the ultimate repository of law enforcement power in the county makes a deliberate decision to abuse that power to the detriment of its citizens, county liability under section 1983 must attach, provided that the other prerequisites for finding liability under that section are satisfied. The district court erred in